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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CLARENCE CARL WILLIAMS, Defendant and Appellant.	E071016 (Super.Ct.No. RIF1603813) OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge. Affirmed with directions.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Police responding to an early morning burglary alarm at a Riverside restaurant found Clarence Carl Williams in front of the building. Williams fled, but police quickly arrested him behind the building. The officer watched the restaurant's surveillance video with the restaurant manager, which showed a man of similar stature and wearing similar clothing attempting to steal from one of the cash registers. The officer requested the video from the restaurant manager several times, but never received it, and the restaurant failed to archive the video. However, screenshots taken from the video were saved and introduced at trial. A jury convicted Williams of felony burglary and misdemeanor vandalism, and the trial court imposed concurrent sentences on the two counts.

On appeal, Williams argues the trial court erred when it denied his motion to dismiss based on the loss of the video evidence, which he says is potentially exculpatory. The trial court found the evidence did not support a finding of bad faith on the part of the police or law enforcement, and substantial evidence supports the court's determination.

Williams also argues, and the People concede, the trial court should have stayed the sentence on his misdemeanor vandalism conviction because it was part of the same indivisible course of conduct as the burglary. We agree and will modify the sentence.

Finally, appellant argues his sentence was unauthorized because the trial court imposed two conditions—a prohibition against possessing deadly weapons and an order to participate in in-prison drug counseling—which he says are not supported by statute. We conclude Williams failed to adequately articulate a basis for overturning these orders, and, in any event, the orders were within the court's authority.

I

FACTS

The Riverside District Attorney charged Williams with one count of felony burglary (Pen. Code, § 459, unlabeled statutory citations refer to this code) and one count of felony vandalism (§ 594, subd. (b)(1)).[1]

Before trial, Williams sought to dismiss the case because the police failed to obtain surveillance video from the restaurant. Williams argued the People knew about the video, which may have been exculpatory, and had willfully destroyed or failed to preserve it. The People responded the video was lost through inadvertence and still photographs taken from the video constituted comparable evidence.

At a hearing on the motion, Williams called the Riverside police officer who had viewed the surveillance video. The officer said he watched the video twice with the restaurant manager and asked her to take screenshots and send the video and screenshots to him. Though he wrote in his report that he received the video, he said he never did. Later, he tried to contact the manager about the video at least two times, but he got no response. Eventually, he received still screenshots from the video. He said those arrived in an interoffice mail envelope, and he didn't know who sent them.

Defense counsel acknowledged she didn't know if the video would have been exculpatory and it appeared the police officer didn't act in bad faith. However, she

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[1] The People also alleged Williams had suffered two prior strikes (§§ 667, subds. (c) & (e)(2)(A), 1170.12, subd. (c)(2)(A)) and three prison priors (§ 667.5, subd. (b)).

argued there was bad faith on the part of the police department because the video was missing. The trial court denied the motion to dismiss because the case law required "bad conduct on the part of law enforcement," which the court was not prepared to find "at this point."

At trial, police described how they detained Williams at the scene of the burglary on August 2, 2016. They received an early morning alarm from Café Sevilla. A canine officer was first on the scene and found appellant standing on a landing of the stairwell in front of the restaurant. The officer said Williams wore a black jumpsuit and hat. Williams and the officer looked at each other, and Williams ran up the stairs into the patio area. The officer identified Williams in court as the person he saw at the restaurant. Police set up a perimeter around the restaurant and eventually detained Williams outside, in back. Afterward, the canine officer and his police dog searched the remainder of the restaurant, but found no one else on the premises.

Williams wasn't wearing a hat when detained, but police later found a discarded hat on the top floor. When police searched Williams, they found two screwdrivers. They also found a pair of gloves police saw Williams discard near a bush while he was walking behind the restaurant.

The officer said he recognized Williams as the man in the video, which he said showed a man wearing long-sleeved dark clothing whose stature and features were similar to Williams'. The manager also identified Williams from the video. She said she recognized him from the video based on his appearance, and "just clearly the look of the

person." She said the video no longer exists because the restaurant doesn't archive footage indefinitely. But she said several screenshots taken from the video footage and shown to the jury were accurate depictions of the video.

The officer told the jury he had requested, but never received, the video. He acknowledged submitting a report that said he had received the video, and explained he had already written the report and included the part saying the manager had sent the video assuming she would do so. When he got to the station and still didn't have the video, he turned in the report containing the inaccuracy. He said he should have handled the situation differently by changing his report to say the manager "will be providing" the video.

The restaurant manager testified about the state of the restaurant after the burglary. She said the wood and glass door from the patio had been pried apart and wood from the door lay scattered on the ground. She said the bar area was a mess, a computer monitor had been tipped over, and some drawers had been pried open. The cash register drawer had been removed and was lying at the bottom of the stairs near the entrance to the patio.

On June 5, 2018, a jury convicted appellant of felony burglary (§ 459) and misdemeanor vandalism (§ 594, subd. (b)(2)(A)). Williams admitted the two prior strikes and three prison priors.

At sentencing, the trial court granted the People's motion to strike one of the prison priors, but denied Williams' *Romero* motion. The court imposed an eight-year prison sentence consisting of three years for the burglary, doubled for the prior strikes,

and two one-year terms for the two remaining prison priors. The court also imposed a concurrent term of 180 days for the misdemeanor vandalism count.

Appellant filed a timely notice of appeal.

II

ANALYSIS

A. *Challenging the Denial of Williams' Motion to Dismiss Under Trombetta*

Williams argues the trial court erred by denying his motion to dismiss based on the unavailability of the surveillance video from the restaurant. He says the People had a duty to preserve video evidence that may have had exculpatory value, and its loss requires reversal per se because the destruction of the evidence was structural error that denied him a full and fair opportunity to present his defense.

When a defendant claims the state failed to preserve evidentiary material that could have been useful to the defense, the defendant must meet the standards set forth in *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*) or *Arizona v. Youngblood* (1988) 488 U.S. 51 (*Youngblood*). To obtain dismissal, a defendant must show the evidence possessed "an exculpatory value that was apparent before the evidence was destroyed and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Trombetta*, at p. 489.) "[I]f the best that can be said of the evidence is that it was 'potentially useful,' the defendant must also establish bad faith on the . . . police or the prosecution." (*People v. Alvarez* (2014) 229 Cal.App.4th 761, 773 (*Alvarez*); see also *Youngblood*, at pp. 57-58.)

"[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Youngblood*, *supra*, 488 U.S. at p. 58.) *Trombetta* "does not apply when there is a nonmalicious loss or destruction of evidence in the possession of a third party that is not subject to control by the prosecution." (*People v. Gopal* (1985) 171 Cal.App.3d 524, 542.) The negligent destruction or failure to preserve potentially exculpatory evidence, without evidence of bad faith, will not give rise to a due process violation. (*Youngblood*, at p. 58.)

The trial court's finding as to "whether evidence was destroyed in good faith or bad faith is essentially factual: therefore, the proper standard of review is substantial evidence." (*People v. Memro* (1995) 11 Cal.4th 786, 831.) We therefore view the evidence in the light most favorable to the trial court's finding to determine if there was substantial evidence to support its ruling. (*People v. Carter* (2005) 36 Cal.4th 1215, 1246.)

Williams concedes there's no evidence the video was in fact exculpatory, but argues the video was "potentially exculpatory" with the meaning of *Youngblood* because it could be "of use to a defendant in challenging the officer's identification." We therefore focus on the evidence of bad faith by law enforcement or the prosecution. (*Youngblood*, *supra*, 488 U.S. at pp. 57-58; *Alvarez*, *supra*, 229 Cal.App.4th at p. 773.)

Substantial evidence supports the trial court's finding Williams didn't establish bad faith on the part of law enforcement. During the pretrial hearing, the police officer

explained his unsuccessful attempts to obtain the surveillance video from the restaurant manager. He said he watched the video with her and asked her to take screenshots and email him a copy of the video. He didn't receive the video. However, when the case later moved forward, he tried to contact the manager twice more, unsuccessfully. The officer's testimony was uncontested. The manager testified at trial that the restaurant later erased the video in accord with their policy of archiving recordings for a limited period.

The only anomaly was the fact the police report said the officer had received the video. He explained he had written the report before discovering the manager hadn't sent the video. He had assumed it would come and then submitted the report despite the inaccuracy. He acknowledged it was a poor decision on his part to submit the report without changing it to reflect the fact that the video hadn't arrived.

We conclude substantial evidence supports a finding that neither the police nor the prosecution acted maliciously in failing to obtain or preserve the video surveillance. Under the substantial evidence standard the testimony of one witness may be sufficient to support the verdict, even if there is other evidence that would support contrary findings. (Evid. Code, § 411 ["the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact"]; *Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1246-1247.)

B. *Staying the Sentence for the Misdemeanor Vandalism Conviction*

Williams argues the trial court erred in failing to stay the sentence on his

misdemeanor vandalism conviction because the burglary and vandalism, which occurred when he broke into the Café Sevilla and attempted to pry open the cash registers, constituted an indivisible course of conduct aimed at accomplishing the theft. The People concede Williams had a single objective and the trial court should have stayed the misdemeanor sentence, and we agree.

Section 654 directs, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The purpose of this section is to "ensure that the defendant's punishment will be commensurate with his culpability." (*People v. Sanders* (2012) 55 Cal.4th 731, 742; *People v. Jones* (2012) 54 Cal.4th 350, 367.)

Where, as here, a case involves more than a single act, the application of section 654 turns on "whether that course of conduct reflects a single 'intent and objective' or multiple intents and objectives." (*People v. Corpening* (2016) 2 Cal.5th 307, 311.) That determination is factual, and appellate courts sustain such findings if supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730; *People v. Harrison* (1989) 48 Cal.3d 321, 335.) In this case, as the People concede, there is nothing to suggest Williams had separate objectives when he entered the restaurant. He plainly entered with the intent to steal and damaged a door and cash registers in pursuit of that objective.

As a result, the shorter vandalism count must be stayed. (§ 654; *People v. Kramer* (2002) 29 Cal.4th 720, 722.) We will therefore modify the sentence and stay the misdemeanor term. (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1248 ["Where multiple punishment has been improperly imposed, '. . . the proper procedure is for the reviewing court to modify the sentence to stay imposition of the lesser term'"].)

C. *Challenging the Sentencing Order Conditions as Unauthorized*

At the sentencing hearing, the trial court told Williams not to "knowingly own, possess, or have in your control firearms, deadly weapons or ammunition." The court also ordered him to "participate in a counseling or educational program having substance abuse component." Williams argues these orders "must be stricken as unauthorized."

We reject this challenge. First, as the People argue, this portion of Williams' appeal is "perfunctorily asserted without argument in support." (*People v. Williams* (1997) 16 Cal.4th 153, 206.) Williams doesn't explain why we should conclude these orders are unauthorized other than to say they aren't "provided for by statute." Though we hesitate to hold arguments have been waived, and have the discretion to reach the merits, appellate courts do not typically conceive and articulate legal arguments for the parties. "[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration." (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

In any event, the trial court's orders are authorized. Section 29800 prohibits convicted felons from owning or possessing firearms. And section 1203.096 permits the trial court to order defendants to "participate in a counseling or education program having a substance abuse component while imprisoned." Williams' challenge to these conditions is wholly without merit

III

DISPOSITION

We modify the judgment to stay the sentence on Williams' misdemeanor vandalism count (count 2) and affirm the judgment in all other respects. We direct the trial court to modify the abstract of judgment and correct the sentencing minute order in accordance with this opinion, and forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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SLOUGH
J.

We concur:

McKINSTER
Acting P. J.

CODRINGTON
J.